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SERVICE DATE – MARCH 10, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board, having assessed its procedures for transactions qualifying for the 7 and 21-day class exemptions proposes to modify the timeframes in its rules to provide greater public notice in advance of an exempt transaction. The proposed changes are intended to ensure that the public is given notice of a proposed transaction before the exemption becomes effective; and that the Board may process such notices of exemption, and related petitions for stay, if any, in an orderly and timely fashion.

DATES: Comments are due on May 15, 2006. Replies are due on June 14, 2006.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's "www.stb.dot.gov" website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (referring to STB Ex Parte No. 659) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. Comments must be filed in accordance with the Board's requirements at 49 CFR part 1104.

Copies of written comments will be available from the Board's contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: asapdc@verizon.net; telephone number: 202-306-4004). The comments will also be available for viewing and self-copying in the Board's Public Docket Room, Room 755, and will be posted to the Board's website at www.stb.dot.gov.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1609.
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The purpose of this notice of proposed rulemaking (NPRM) is to obtain comments on a proposal to provide the public with additional notice that certain of the Board's class exemptions have been invoked before those exemptions become

effective. These class exemptions are proposed to be modified only as described herein. The scope, purpose and effect of these rules otherwise remains the same. Thus, the Board does not propose to make any changes to situations in which a class exemption can be used, or the information that entities seeking to use a class exemption must provide. This proceeding is based on the Board's exemption authority at 49 U.S.C. 10502. The rules that are the subject of this proposal (those found at 49 CFR 1150 subpart D (Exempt Transactions Under 49 U.S.C. 10901), 49 CFR 1150 subpart E (Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers), and 49 CFR 1180 subpart A (General Acquisition Procedures)) were established in the following agency proceedings: Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, Ex Parte No. 392; Class Exemption for the Acquisition or Operation of Rail Lines by Class III Rail Carriers Under 49 U.S.C. 10902, STB Ex Parte No. 529; and Railroad Consolidation Procedures, STB Ex Parte No. 282. For administrative convenience, a single new docket number is being used to permit consolidated consideration of the proposed procedural changes in one proceeding.

Overview

Under 49 U.S.C. 10502(a), the Board may exempt individual transactions or classes of transactions from the application requirements of the statute when it finds that full regulatory scrutiny is not required and the transaction or service will be limited in scope or greater regulatory scrutiny is not needed to protect shippers from an abuse of market power. If the Board grants an exemption, it may later revoke the exemption authority if it finds that action to be necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (49 U.S.C. 10502(d)), or the notice may be deemed void ab initio if it contains false or misleading information.

There are some situations in which Board authorization is granted so routinely that the Board has put in place a "class exemption" allowing parties to use abbreviated, summary procedures for obtaining that authority, subject to after-the-fact Board review if objections are received. The Board's class exemptions provide an expedited process for railroads to obtain Board authority in routine and uncontroversial cases and some assurance that transactions qualifying for the class exemption can be consummated on a date that can be predicted in advance.

Pursuant to 49 U.S.C. 10502, the Board and its predecessor, the Interstate Commerce Commission (ICC), have exempted certain classes of transactions from the prior approval requirements of 49 U.S.C. 10901, 10902, and 11323. By this process, class exemptions have been created for the following types of transactions that are the subject of this NPRM (collectively, the Ten Exempt Transaction Types): (1) rail line acquisitions and similar transactions involving the creation of a Class III carrier (49 CFR 1150 subpart D);¹ (2) rail line

¹ Class Exemption – Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd, Illinois Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

acquisitions and similar transactions involving a Class III carrier (49 CFR 1150 subpart E);² (3) acquisitions of a line authorized for abandonment that do not entail major market extensions (49 CFR 1180.2(d)(1));³ (4) acquisitions or continuances in control of a nonconnecting carrier or multiple nonconnecting carriers (49 CFR 1180.2(d)(2)); (5) corporate family transactions (49 CFR 1180.2(d)(3)); (6) renewals of a lease or operating agreement previously authorized (49 CFR 1180.2(d)(4)); (7) joint projects involving a rail line relocation (49 CFR 1180.2(d)(5)); (8) reincorporations in a different state (49 CFR 1180.2(d)(6)); (9) acquisitions or renewals of trackage rights (49 CFR 1180.2(d)(7));⁴ and (10) acquisitions of temporary trackage rights (49 CFR 1180.2(d)(8)).⁵ The class exemptions under 49 CFR 1150 subparts D and E also extend to transactions involving the creation of Class I and II carriers, but the procedures at 49 CFR 1150.35 and 1150.45 differ from those applicable to transactions involving Class III carriers, and will be discussed later.⁶

For each of the Ten Exempt Transaction Types, the Board's regulations currently provide that the exemption will become effective – and that the transaction may be consummated – 7 calendar days after a notice invoking the class exemption is filed at the Board. See 49 CFR 1150.32(b), 1150.42(b), and 1180.4(g). Notice of the exemption is published in the Federal Register within 30 days of the filing except for acquisitions of trackage rights or temporary trackage rights, in which case notice is published within 20 days. See 49 CFR 1150.32(b), 1150.42(b), 1180.4(g)(1)(ii), 1180.4(g)(2)(ii), 1180.4(g)(2)(iv). Consequently, Federal Register notice of a transaction is published after the exemption has become effective and often after the transaction has been consummated.

The regulations at 49 CFR part 1150 governing the creation of Class I and II carriers presently require that the Board be notified of the applicant's intent to file a notice of exemption at least 14 days before the notice of exemption is filed. See 49 CFR 1150.35(a), 1150.45(a). These exemptions become effective 21 days after the notice of exemption is filed. Publication in

² Class Exem. for Acq. or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996) (Class Exemption – 10902) (reconsideration denied, STB served Nov. 29, 1996).

³ The class exemptions for transactions under 49 CFR 1180.2(d)(1)-(6) were adopted in Railroad Consolidation Procedures, 363 I.C.C. 200 (1980), and modest modifications have been adopted thereafter. See, e.g., Rail Consol. Proc. – Con. in Cont. of Nonconnecting Carrier, 2 I.C.C.2d 677 (1986).

⁴ Railroad Consolidation Procedures, 1 I.C.C.2d 270 (1985).

⁵ Railroad Consolidation Procedures, STB Ex Parte No. 282 (Sub-No. 20) (STB served May 23, 2003, modified, STB served May 17, 2004).

⁶ These regulations were created pursuant to Class Exemption – Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 4 I.C.C.2d 309 (1988); and Class Exemption – 10902.

the Federal Register takes place within 30 days after the notice is filed. See 49 CFR 1150.35(e), 1150.45(e). Once again, formal public notice of the transaction might not occur until after the transaction has been consummated.

To ensure that the public is given notice of proposed transactions presented under one or more of the class exemptions before the exemptions become effective, and that the Board may process such notices of exemption, and related petitions for stay, if any, in an orderly and timely fashion, the Board proposes to modify these class exemption procedures.

Proposed Procedures for the Ten Exempt Transaction Types

As set forth in the proposed regulations below, the Board would modify the procedures for the Ten Exempt Transaction Types as follows: (1) notice of the proposed transaction would be published in the Federal Register within 16 days of filing; (2) stay petitions would be due at least 7 days prior to the effective date of the exemption; and (3) the exemption, if not stayed, would take effect 30 days after the notice is filed.

In arranging for Federal Register publication within 16 days of the filing, the Board would review the notice, determine if it is complete and qualifies for use of the exemption, prepare and/or edit a caption summary for publication, and forward the notice, in appropriate format, to the Office of the Federal Register. Requiring stay petitions to be filed no later than 7 days before the effective date of the exemption would permit more orderly handling of requests for stay.

The Board also proposes that an exemption filed under these procedures would take effect 30 days after the notice has been filed. In so doing, the Board would adhere to the well-established process of setting forth a date certain by which an exempt transaction should be able to be consummated. With such a process in place, an entity seeking to invoke a class exemption would be able to structure its transaction knowing the earliest available consummation date.

As previously noted, these modifications are purely procedural. Nothing else about these class exemptions would be changed. The types of transactions qualifying for the class exemption would not change, nor would the regulations setting forth the information to accompany a notice of exemption. Petitions to revoke an exemption could still be filed at any time.

Procedures for Transactions that Would Create a Class I or Class II Carrier

The Board proposes similar changes to the notice requirements at 49 CFR 1150 subparts D and E for transactions involving the creation of a Class I or Class II carrier. As set forth in the proposed regulations, the Board would modify the procedures at 49 CFR 1150.35 and 1150.45 as follows: (1) notice of a covered transaction would be published in the Federal Register within 16 days of filing; (2) petitions for stay would be due no later than 14 days prior to the effective date of the exemption;⁷ and (3) the exemption would take effect 45 days after filing. The 14-day advance notice of intent to file requirements currently in place would not change.

In keeping with the procedural changes proposed for the Ten Exempt Transaction Types discussed above, these modifications would provide greater public notice in advance of a transaction. As now, a notice filer would have a reliable process and could predict with reasonable certainty when it should be able to consummate a transaction covered by sections 1150.35 and 1150.45. As with the proposed procedures for the Ten Exempt Transaction Types, the proposed changes to 49 CFR 1150.35 and 1150.45 are purely procedural.

Only those class exemptions specifically referenced herein are affected by the NPRM, i.e., 49 CFR 1150 subpart D; 49 CFR 1150 subpart E; 49 CFR 1180.2(d)(1); 49 CFR 1180.2(d)(2); 49 CFR 1180.2(d)(3); 49 CFR 1180.2(d)(4); 49 CFR 1180.2(d)(5); 49 CFR 1180.2(d)(6); 49 CFR 1180.2(d)(7); and 49 CFR 1180.2(d)(8). Other class exemptions – for example, those for exempt construction of connecting track (49 CFR 1150.36) and for exempt abandonments and discontinuances of service and trackage rights (49 CFR 1152.50) – are not affected by this NPRM because they already provide for significantly longer notice periods.

Comments

The Board invites comments on the proposed regulations. Written comments (an original and 10 copies) are due on May 15, 2006. Replies are due on June 14, 2006. All comments must comply with the Board's requirements at 49 CFR part 1104.

Regulatory Flexibility Analysis

The Board certifies that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulations, while modestly increasing the lengths of the notice requirement for the applicant, would continue to benefit individuals and entities potentially affected by transactions covered by the regulations by providing exemptions from statutory approval requirements for entire classes of transactions.

⁷ As is the case now, replies to stay petitions filed under sections 1150.35 and 1150.45 would be due 7 days after the stay petition has been filed.

These exemptions may still be invoked merely by filing a notice with the Board, so long as the requirements are met and the required processes are followed. That notice will cause the exemption to become effective as to the transaction identified in the notice in a period of time specified by rule.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR parts 1150 and 1180

Administrative Practice and Procedure, Railroads.

Authority: 49 U.S.C. 10502 and 5 U.S.C. 553.

Decided: March 9, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1150 and 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES.

1. The authority citation for Part 1150 continues to read as follows:

AUTHORITY: 49 U.S.C. 721(a), 10502, 10901, and 10902.

2. Amend § 1150.32 as follows:

- A. In paragraph (b), remove the words “30 days” and add, in their place the words “16 days”.

- B. In paragraph (b), remove the words “7 days” and add, in their place, the words “30 days”.

- C. In paragraph (c), add a new sentence to the end of the paragraph as follows:

§ 1150.32 Procedures and relevant dates—transactions that involve creation of Class III carriers.

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(c) * * * Stay petitions must be filed at least 7 days before the exemption becomes effective.

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3. Amend § 1150.35 as follows:

- A. In paragraph (e), remove the words “21 days” and add, in their place, the words “45 days”.

- B. In paragraph (e), remove the words “30 days” and add, in their place, the words “16 days”.

- C. In paragraph (f), revise the third sentence to read as follows:

§ 1150.35 Procedures and relevant dates—transactions that involve creation of Class I or Class II carriers.

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(f) * * * Stay petitions must be filed at least 14 days before the exemption becomes effective. * * *

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4. Amend § 1150.42 as follows:

A. In paragraph (b), remove the words “30 days” and add, in their place, the words “16 days”.

B. In paragraph (b), remove the words “7 days” and add, in their place, the words “30 days”.

C. In paragraph (c), add a new sentence to the end of the paragraph as follows:

§ 1150.42 Procedures and relevant dates for small line acquisitions.

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(c) * * * Stay petitions must be filed at least 7 days before the exemption becomes effective.

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5. Amend § 1150.45 as follows:

A. In paragraph (e), remove the words “21 days” and add, in their place, the words “45 days”.

B. In paragraph (e), remove the words “30 days” and add, in their place, the words “16 days”.

C. In paragraph (f), revise the third sentence to read as follows:

§ 1150.45 Procedures and relevant dates—transactions under section 10902 that involve creation of Class I or Class II rail carriers.

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(f) * * * Stay petitions must be filed at least 14 days before the exemption becomes effective. * * *

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PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES.

6. The authority citation for Part 1180 continues to read as follows:

AUTHORITY: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

7. Amend § 1180.4 as follows:

A. In paragraph (g)(1) introductory text, remove the words “one week” and add, in their place, the words “30 days”.

B. In paragraph (g)(1)(ii), remove the words “30 days” and add, in their place, the words “16 days”.

C. Redesignate paragraph (g)(1)(iii) as paragraph (g)(1)(iv) and add a new paragraph (g)(1)(iii).

D. Remove paragraph (g)(2)(ii).

E. Redesignate paragraph (g)(2)(iii) as paragraph (g)(2)(ii).

F. Remove paragraph (g)(2)(iv).

§ 1180.4 Procedures.

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(g) * * *

(1) * * *

(iii) The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption. Stay petitions must be filed at least 7 days before the exemption becomes effective.

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